

No. 42914-4-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

TERRY L. JACOB,

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Appeal from the Superior Court of Mason County  
The Honorable Amber Finlay

No. 11-1-00354-0

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**BRIEF OF RESPONDENT**

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Because Jacob proffered no evidence to support any theory that use of an inhaler would or could affect the test results of a blood test for alcohol content of the blood, the trial court did not abuse its discretion when it excluded evidence that Jacob used an inhaler on the day of his arrest for driving under the influence.
2. Under the recent decision of *State v. Morales*, 168 Wn. App. 489, 278 P.3d 668 (May 29, 2012), the State is forced to concede that Jacob's offender score was wrongly calculated in the instant case.
3. The trial court erred by imposing a combined total term of community custody and incarceration that is disallowed by RCW 9.94A.701(9).

B. FACTS AND STATEMENT OF THE CASE

On October 3, 2011, at about 6:05 p.m., Deputy LaFrance of the Mason County Sheriff's Office saw Terry Jacob driving a vehicle on State Route 300 in Mason County. RP 25-27. Deputy LaFrance had been advised earlier that Jacob had an active warrant for his arrest; so, she radioed dispatch and confirmed the warrant, and in the process she also learned that Jacob's driving privileges were revoked in the first degree. RP 26-27, 99. Deputy LaFrance activated her overhead police lights and stopped Jacob. RP 27.

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When Deputy LaFrance approached Jacob at the driver's window, she noticed that he had only partially rolled down his window. RP 28. Nevertheless, she smelled a strong odor of alcohol coming from inside the vehicle. RP 28. Deputy LaFrance asked Jacob to step out of the vehicle. RP 28.

As Jacob stepped out of the vehicle, he braced himself on the door-frame as he was talking and slurring his words; his eyes were red and watery. RP 28-29. Jacob was smoking a lit cigarette when he got out of the car; so, Deputy LaFrance told him to put it out. Jacob slurred that it was out, but afterward he continued to smoke it -- but then put it out. RP 29.

Deputy LaFrance arrested Jacob and read him Miranda rights. RP 29-31. Once he was out of the car and under arrest, Deputy LaFrance observed that Jacob continued to exhibit red, watery eyes and slurred speech, and that he continued to emit an odor of alcohol. RP 29-30. Deputy LaFrance summoned Deputy Dugan to the scene, because Deputy Dugan has specialized training in investigating DUIs. RP 34-37.

When Deputy Dugan arrived at the scene, he contacted Jacob, who was seated in the back of Deputy LaFrance's patrol car. RP 39. Deputy Dugan smelled the strong odor of intoxicants coming from Jacob. RP 39.

Deputy Dugan asked Jacob whether he would perform voluntary field sobriety tests, and Jacob agreed to do the tests. RP 39-40.

Jacob said he had a bad knee and would not be able to do the one-leg-stand test or the walk-and-turn test; so, Deputy Dugan administered the finger dexterity test, the HGN test, and the finger-to-nose test. RP 41-42. Jacob exhibited both cognitive and physical impairments when he performed the finger dexterity test. RP 43. Jacob exhibited physical impairment when he performed the finger-to-nose test. RP 44. Jacob exhibited six of six clues on the HGN test, which in Deputy Dugan's training would indicate probable impairment. RP 47-49.

Deputy Dugan reread Miranda rights to Jacob, and he read him the implied consent warnings for a breath alcohol test. RP 51-57. Jacob refused to provide a breath sample. RP 57-58. Deputy Dugan placed Jacob into a holding cell at the jail, and he then went and applied for a search warrant to obtain a sample of Jacob's blood. RP 58. The judge granted the warrant, and Deputy Dugan then took Jacob to Mason General Hospital for a blood draw. RP 58-61.

At 10:20 p.m., a lab technician took two vials of blood from Jacob. RP 61, 67. Deputy Dugan sent the vials of blood to the Washington State Toxicology Laboratory for analysis. RP 61, 63-69. The results of the

blood analysis showed that 10:20 p.m., which was four hours and fifteen minutes after the time of driving, Jacob's blood alcohol content (BAC) was 0.10 grams of alcohol per 100 milliliters of blood. RP 75, 135. All persons, including both experienced drinkers and naive drinkers, are impaired at a level of 0.08. RP 117. Jacob did not have anything to eat or drink during the time between his arrest and when his blood was drawn. RP 93, 94. Considering Jacob's BAC at the time of the blood draw and comparing that -- by use of the scientific technique of retrograde extrapolation -- to the burn-off and absorption rates of alcohol in the human body shows that at the time of driving Jacob had a BAC of not less than 0.12 grams of alcohol per 100 milliliters of blood. RP 109-112, 135-140.

At trial, the jury received the evidence as described above. Jacob chose to testify in his own defense. RP 167. During the State's cross examination of Jacob, a recess was taken, and during this recess, Jacob, through his attorney, disclosed that he wished to testify that he had used an inhaler on the day of his arrest. RP 213-214. In support of his effort to present this testimony, Jacob's attorney told the court:

[U]sing an inhaler would be one of the drugs that -- my research shows that it has to do with diabetic drugs and things like that that increase one's blood alcohol content falsely by taking medications.

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And Mr. Jacob wanted me to inquire of him of his inhaler. He uses it for COPD and he used it that day.

RP 214. Additionally, trial counsel told the court that "there was testimony yesterday from the forensic scientist about medications that may have an effect on blood alcohol level content." RP 213-214. It appears, however, that trial counsel was mistaken, as a review of the record shows only that there was testimony regarding the effects of other central nervous system depressants on HGN, and testimony that the lab tests for compounds other than alcohol in addition to alcohol tests. RP 120, 123, 125, 126.

After hearing Jacob's offer of proof regarding the use of an inhaler, the trial court ruled to exclude the evidence on the basis that "there has to be testimony that demonstrates that it is relevant." RP 215. The trial judge explained her ruling, as follows:

[U]nless you have testimony that demonstrates that this actually does affect the... alcohol reading -- it's not relevant that he did it... [W]e're looking at whether or not it actually had an effect on the actual reading, which is more of a scientific nature. You need to have some type of evidence to establish that. So, unless you have that, the Court would find that it's not relevant.

RP 215. Jacob offered no testimony on his use of an inhaler other than that he had used an inhaler. There was no offer of proof, other than

speculation, regarding what, if any, affect the use of an inhaler might have on matter at issue in the case. RP 213-215.

After hearing the evidence, a Mason County jury convicted Jacob of the crimes of felony driving under the influence and driving while license revoked in the first degree. RP 265. Sentencing occurred on December 8, 2011. RP 267-294.

At the time of his arrest, and at sentencing, Jacob had seven prior convictions of driving under the influence, as follows:

	Crime	Date of Crime	Date of Sentence
1	Felony DUI	01/03/09	05/11/09
2	DUI	03/06/03	07/03/03
3	DUI	01/31/01	06/05/01
4	DUI	05/17/00	06/05/01
5	DUI	11/29/99	06/05/01
6	DUI	01/26/97	08/21/97
7	DUI	08/29/88	06/05/89

CP 7; RP 271-275, 284, 287-288. In addition, Jacob has a controlled substance felony conviction from 1993 and in April of 2005 was convicted

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of driving while license suspended in the first degree. RP 285, 287-288.

Because of Jacob's 2005 conviction for DWLS, the court found that there was no unbroken five-year wash period between Jacob's 2003 and his 2009 convictions for DUI; thus, each of his convictions for DUI contributed one point to his offender score, for a total of seven points. RP 288; CP 7. Additionally, the court added one point for Jacob's 1993 controlled substance felony conviction, and added one point because Jacob was on community supervision when he committed the current offense. RP 288; CP 7. The court found that Jacob had, in total, an offender score of nine. RP 288; CP 7.

The court sentenced Jacob to the maximum term of incarceration, a period of sixty months. RP 290; CP 8. Recognizing that notwithstanding the sentence imposed by the court, Jacob might nevertheless be released from confinement in less than sixty months due to earned early release, the court also imposed "community custody for any period of earned release" or for twelve months. RP 290-291; CP 8-9. Twice in the judgment and sentence, the court included language that the total time spent in community custody and confinement shall not exceed sixty months. CP 8-9.

C. ARGUMENT

1. Because Jacob proffered no evidence to support any theory that use of an inhaler would or could affect the test results of a blood test for alcohol content of the blood, the trial court did not abuse its discretion when it excluded evidence that Jacob used an inhaler on the day of his arrest for driving under the influence.

Application of the rules of evidence and the exclusion of evidence is a matter within discretion of the trial court. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). The trial court's ruling excluding evidence is reviewed for an abuse of discretion. *Id.* at 619. "Abuse exists when the trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or reasons.'" *Id.* at 619, quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Jacob asserts that the trial court erred when it disallowed his proffer of testimony that he had used an inhaler on the day of his arrest. But Jacob did not proffer testimony to show the relevance of his proffered testimony, and he has not properly preserved the relevancy issue for appeal because he did not preserve the issue at trial with an offer of proof. ER 103(a)(2).

Jacob's offer of proof was limited to his assertion that he wanted to offer testimony that he had used an inhaler on the day of his arrest. RP

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213-215. He asserted that his use of an inhaler could affect the report of the alcohol content of his blood. RP 213-215. But Jacob did not adequately provide an offer of proof that attempted to show how the use of an inhaler would affect his blood alcohol test results. RP 213-215.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "Evidence which is not relevant is not admissible." ER 402. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602. A non-expert witness may not testify "in the form of opinions or inferences" that are "based on scientific, technical, or other specialized knowledge..." ER 701. The only evidence proffered by Jacob was that he had used an inhaler on the day of his arrest and that he thought it might affect the alcohol-content test of his blood. RP 213-215. But there was no evidence to show that it was even possible that an inhaler would affect a blood test for alcohol, and the mere use of an inhaler, therefore, was irrelevant. ER 401.

Because any affect that the use of an inhaler might have upon a test to determine blood alcohol content was speculative and was unsupported

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by any evidence, the trial court did not abuse its discretion by excluding evidence that Jacob had used an inhaler on the day of his arrest. ER 402; *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

2. Under the recent decision of *State v. Morales*, 168 Wn. App. 489, 278 P.3d 668 (May 29, 2012), the State is forced to concede that Jacob's offender score was wrongly calculated in the instant case.

In 2009, Jacob was convicted of a prior crime of felony driving under the influence under RCW 46.61.502(6)(a) for a crime that occurred in 2009, because at that time he had four prior DUI convictions within ten years of the 2009 offense. CP 7; RP 271-275, 284, 287-288. Sentencing occurred on May 11, 2009. CP 7. Two years and almost five months later, Jacob committed the current offense. CP 6. When Jacob committed the current offense, however, only two of his prior convictions fell within ten years of the current offense, but his current offense was nevertheless a felony because he had a prior conviction for felony driving under the influence. RCW 46.61.502(6)(b)(iv).

When Jacob committed the current offense, he had seven prior convictions for driving under the influence. CP 7. The most recent of the these convictions, committed on May 11, 2009, was the felony conviction.

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CP7. His next most recent conviction for impaired driving was a gross misdemeanor conviction committed on July 3, 2003. CP 7. Thus, there was a gap of five years and ten months between Jacob's most recent conviction and the next most recent conviction. CP 7. Accordingly, unless there were an intervening crime during that time, six of Jacob's prior DUI convictions would not be scored for purposes of RCW 9.94A.525.

RCW 9.94A.525(c) states that "[e]xcept as provided in (e) of this section," Jacob's six older DUIs shall not be included in his offender score if he had not committed any crime during any five-year period between the current crime and the last DUI. Jacob was convicted of driving with a revoked license in 2005; so, except as provided in subsection (e), all of Jacob's prior DUIs would count in his offender score. RCW 9.94A.525; CP 7; RP 271-275, 284, 287-288.

RCW 9.94A.525(2)(e), however, states that "[i]f the present conviction is felony driving under the influence...[,] prior convictions for DUI shall be included in the offender score if "[t]he prior convictions were committed within five years since the last date of release from confinement..." RCW 9.94A.525(2)(e)(i).

The recent decision of *State v. Morales*, 168 Wn. App. 489, 278 P.3d 668 (May 29, 2012), has interpreted RCW 9.94A.525 to mean that if the current offense is for felony driving under the influence, then only the crimes named in the statute can count toward interrupting the five-year crime free time required to "wash" prior convictions.

The class of crimes named in RCW 9.94A.525(2)(e) include only felony driving under the influence and felony physical control convictions and serious traffic offenses. "Serious traffic offenses" includes only driving under the influence, physical control, reckless driving, and hit and run of an attended vehicle. RCW 9.94A.030(44). Under this interpretation, it appears that no crime, regardless of its seriousness, even a vehicular assault or a vehicular homicide, would interrupt the five-year crime-free wash period under RCW 9.94A.525(2)(e) where the current crime is felony driving under the influence.

In the instant case, the sentencing court found that Jacob's 2005 conviction for driving with a revoked license broke the crime-free period between Jacob's 2003 conviction for DUI and his 2009 conviction for felony driving under the influence. CP 7; RP 271-275, 284, 287-288. Thus, the court found, all of Jacob's prior DUI convictions added points to his offender score (as well as a 1993 conviction for controlled substances)

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because none of these convictions were separated by a five-year crime-free period. CP 7; RP 271-275, 284, 287-288.

But driving with a revoked or suspended license is not a "serious traffic offense" under RCW 9.94A.525 or RCW 9.94A.030(44). The facts of the instant case are similar to the facts of *Morales*, where the five-year crime-free period at issue was broken by a conviction of assault in the fourth degree. Neither assault nor driving with a suspended or revoked license are "serious traffic offenses" under RCW 9.94A.525 or RCW 9.94A.030(44).

Thus, the State is forced to concede that under *State v. Morales*, 168 Wn. App. 489, 278 P.3d 668 (May 29, 2012), the sentencing court in the instant case wrongly calculated Jacob's offender score. If this court accepts the State's concession, it is the State's position that this case should be returned to the trial court for resentencing, to include consideration of an exceptional sentence.

3. The trial court erred by imposing a combined total term of community custody and incarceration that is disallowed by RCW 9.94A.701(9).

Felony driving under the influence is a "crime against persons" as defined by RCW 9A.41.1(2)(a). Therefore, under RCW 9A.70.1(3) the court in the instant case was required to sentence Jacob to one year of community custody upon his conviction of felony driving under the influence. RCW 9A.70.1(9), however, requires that when the combined total of incarceration and community custody exceed the statutory maximum for the crime of conviction, the court must shorten or eliminate the term of community custody so that the combined total does not exceed the statutory maximum.

The statutory maximum sentence for felony driving under the influence is five years. RCW 9A.20.021(1)(c). The trial court in the instant case sentenced Jacob to sixty months incarceration with the greater of twelve months or the period of any earned early release to be served on community custody. RP 290-291; CP 8-9. Notwithstanding the court's notation that the combined total of community custody and incarceration shall not exceed sixty months, this sentence is not in compliance with RCW 9A.70.1(9). *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012).

D. CONCLUSION

Jacob did not proffer any evidence to show any relevancy to his proffered testimony that he had used an inhaler on the day of his arrest.

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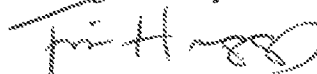
Therefore, the court did not abuse its discretion when it excluded as irrelevant Jacob's proffered testimony that he had used an inhaler.

Under the recent decision of *State v. Morales*, 168 Wn. App. 489, 278 P.3d 668 (May 29, 2012), the sentencing court erred when calculating Jacob's offender score. If this court accepts the State's concession, this court should remand this case for resentencing with discretion restored to the trial court to order any sentence that the facts and law support.

The sentencing court erred by ordering a combined total of community custody and incarceration that is disallowed under RCW 9.94A.701(9), as recently held by *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012). This case should be returned to the trial court to eliminate the term of community custody, or if the case is remanded for resentencing due to an erroneous offender score, this issue will be resolved with the subsequent sentencing.

DATED: August 28, 2012.

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# MASON COUNTY PROSECUTOR

**August 28, 2012 - 5:07 PM**

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